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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 112

DAVIES WAREHOUSE COMPANY, a corporation,
Petitioner,

vs.

PRENTISS M. BROWN, Price Administrator,
Respondent.

Petition for a Writ of Certiorari to the United States Emergency Court of Appeals

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Davies Warehouse Company, prays that a writ of certiorari issue to review the judgment and order of the United States Emergency Court of Appeals entered in the above case on May 28, 1943, dismissing the complaint brought by petitioner against the respondent, Price Administrator.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

The complaint of petitioner (R. 1) was filed with the United States Emergency Court of Appeals on August 25,

1942, for the purpose of determining whether or not the respondent, Price Administrator, has the authority to regulate the rates charged by petitioner and other public warehousemen in the State of California for storage and warehousing and all services incident thereto which they render to the general public as public utilities under the laws of that State.

Petitioner conducts the business of a public warehouseman in the City of Los Angeles, California. Both the constitutional and statutory laws of the State of California expressly declare this particular class of business to be that of a public utility. By the same law, all public utilities are placed under the jurisdiction and control of a regulatory body designated as the Railroad Commission of the State of California. Also, by the same law, the duty is imposed and the power is conferred upon that Commission to fix all rates which may be charged by such public utilities for commodities furnished or services rendered by them.

These laws definitely prescribe that a public utility warehouseman is under an obligation to afford its facilities upon demand to all members of the public alike at fair and non-discriminatory rates and, further, that no warehouseman may directly or indirectly increase any rate or charge, under any circumstances whatsoever, except upon a showing before the Railroad Commission and a finding by that Commission that such increase is justified.

On April 28, 1942, the respondent, acting under the authority conferred upon him by the Emergency Price Control Act of 1942[1] (hereinafter referred to as the Price

Act) issued The General Maximum Price Regulation (R. 46) which fixed as a seller's maximum price for any commodity furnished or service rendered the highest price charged by him during the month of March, 1942. Section 30 of that Regulation, as amended (R. 59), provided that it would not apply to such services as might be specified by supplementary regulations or amendments thereto.

Section 302(c)(2)[2] of the Price Act provides as follows:

> "As used in this Act—
>
> * * * * * * *
>
> (c) The term 'commodity' means commodities, articles, products, and materials (except materials furnished for publication by any press association or feature service, books, magazines, motion pictures, periodicals and newspapers, other than as waste or scrap), and it also includes services rendered otherwise than as an employee in connection with the processing, distribution, storage, installation, repair, or negotiation of purchases or sales of a commodity, or in connection with the operation of any service establishment for the servicing of a commodity: Provided, That nothing in this Act shall be construed to authorize the regulation of * * * (2) rates charged by any common carrier or other public utility * * *"

On June 16, 1942, respondent issued Supplementary Regulation No. 11 by which it was declared that The General Maximum Price Regulation would not apply to certain services until July 1, 1942, and under the services

1. Act January 30, 1942, C. 26, 56 Stat. 23; 50 U.S.C.A. App. §§901 et seq.

2. Act. Jan. 30, 1942, C. 26, Title III, §302(c)(2), 56 Stat. 36; 50 U.S.C.A. App. §942(c)(2).

thus treated were "(2) Commercial storage and warehousing and services incident thereto". (R. 97)

On June 23, 1942, respondent issued Amendment No. 1 to said Supplementary Regulation No. 11 (effective July 1, 1942), providing for the exception of certain services from the operation of The General Maximum Price Regulation. (R. 101) The only common carrier or public utility services which were specifically declared to be exempt by the respondent, Price Administrator, were the following:

> "(21) *Electricity* (companies furnishing, as public utilities), rates charged by (R. 102); * * * (25) *Express companies and freight forwarders* offering their services to the general public as common-carriers, rates charged by (R. 102); * * * (30) *Gas* (companies supplying, as public utilities through mains), rates charged by (R. 103); * * * (38) *Light, heat, or power* (companies furnishing, as public utilities), rates charged by (R. 103); * * * (61) *Telephone* services, rates charged for (R. 104); (62) *Telegraph* service, rates charged for (R. 104); * * * (68) *Transportation of commodities by persons offering their services to the general public as common carriers by rail, water, motor, pipe line, or other means of conveyances*, rates charged for; Provided, however, that charges for storage and warehousing and all other services incident thereto by any person shall not be excluded from the General Maximum Price Regulation. (R. 104); (69) *Transportation of persons*, rates charged for (R. 104); * * * (73) *Water* (companies supplying, to urban areas as public utilities), rates charged by." (R. 105)

Asserting itself to be a public utility within the meaning of the exemption of "any common carrier or other

public utility" set forth in Section 302(c)(2) of the Price Act and therefore aggrieved by the failure of the respondent to exempt its business from The General Maximum Price Regulation, petitioner filed a timely protest with the respondent, Price Administrator (R. 15); the Price Administrator denied the protest (R. 41) and petitioner filed its complaint with the Emergency Court of Appeals (R. 1), asking that court to set aside The General Maximum Price Regulation, said Supplementary Regulation No. 11 and said Amendment No. 1 to said Supplementary Regulation No. 11, insofar as they, and each of them, purport to regulate the rates and charges of petitioner and other public warehousemen in California for public utility storage and warehousing and all services incident thereto. (R. 12)

The theory of respondent in denying the said protest (R. 42) (which he urged before the Emergency Court of Appeals) is that the words "any common carrier or other public utility" as used in the exemption clause of Section 302(c)(2) of the Price Act includes only the so-called traditional utilities and, upon this theory has, by said Amendment No. 1 to Supplementary Regulation No. 11, exempted only the classes of common carriers and public utilities hereinabove mentioned.

Petitioner, on the other hand, contends that the exemption clause in question, as amended by the proviso of Section 1 of the Inflation Control Act of 1942[3] (hereinafter

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3. Act Oct 2, 1942, C. 578, 56 Stat. ____; 50 U.S.C.A. App. §§961 et seq. Section 1 of the Inflation Control Act (Act Oct. 2, 1942, C. 578, §1, 56 Stat. ____; 50 U.S.C.A. App. §961) reads as follows:

"In order to aid in the effective prosecution of the war, the President is authorized and directed, on or before No-

referred to as the Inflation Act) shows a clear Congressional intent to exempt only those classes of common carriers or other public utilities which are under adequate rate regulation by some Federal, State or Municipal authority other than the Office of Price Administration.

Petitioner further contends that even if respondent's theory (that only traditional utilities were intended to be exempted) were correct, petitioner is entitled to exemption, for the reason that public utility warehousemen are just as traditional as are the other classes of public utilities or common carriers which have been exempted under that theory.

OPINION OF THE COURT BELOW

The Emergency Court of Appeals entered its judgment order on May 28, 1943, dismissing the complaint, pursuant to the majority opinion written by Judge Albert B. Maris, concurred in by Judge Calvert Magruder with a dissenting

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vember 1, 1942, to issue a general order stabilizing prices, wages, and salaries, affecting the cost of living; and, except as otherwise provided in this Act, such stabilization shall so far as practicable be on the basis of the levels which existed on September 15, 1942. The President may, except as otherwise provided in this Act, thereafter provide for making adjustments with respect to prices, wages, and salaries, to the extent that he finds necessary to aid in the effective prosecution of the war or to correct gross inequities: *Provided, That no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase.*" (Emphasis supplied.)

opinion by Chief Judge Fred M. Vinson. These opinions are not yet officially reported. Copies thereof are set forth at length in the record (R. 109 et seq.).

JURISDICTION.

The jurisdiction of this Court is invoked under Section 204(d) of the Price Act,[4] which provides that a petition for a writ of certiorari may be filed in this Court within thirty days after entry of a judgment or order by the Emergency Court of Appeals and that thereupon the judgment or order shall be subject to review by this Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended.[5]

STATUTES INVOLVED

The statutes of the United States which are involved in this proceeding are the Emergency Price Control Act of 1942,[6] particularly sections 302(c) and 302(c)(2)[7] thereof

4. Act. Jan. 30, 1942, C. 26, Title II, §204(d), 56 Stat. 31, 50 U.S.C.A. App., Section 924(d).

5. U.S.C., 1934 edition, title 28, §347.

6. Act January 30, 1942, C. 26, 56 Stat. 23; 50 U.S.C.A. App. §§901 et seq.

7. Act January 30, 1942, C. 26, Title III, §§302(c) and 302(c)(2), 56 Stat. 36; 50 U.S.C.A App. §§942(c) and 942(c)(2). The pertinent provisions of these sections are set out at page 3 herein.

and the Inflation Control Act of 1942,[8] particularly Section 1 thereof.[9]

QUESTIONS PRESENTED

The essential question presented in this petition is this: Is petitioner a public utility within the meaning of Section 302(c)(2) of the Price Act as amended by the proviso of Section 1 of the Inflation Act and, as such, exempt from regulation by the respondent, Price Administrator, as to the rates charged by it for storage and warehousing and all other services incident thereto?

Incidental to this question, as it was considered in the court below, the following questions necessarily are presented:

1. Did the court below properly construe Section 302(c)(2) of the Price Act as amended by the proviso of Section 1 of the Inflation Act to mean that Congress intended to exempt only the classes of common carriers and public utilities characterized as the "traditional utilities"?

2. If so, are public utility warehousemen "traditional utilities" within that characterization?

3. In enacting Section 302(c)(2) of the Price Act as amended by the proviso of Section 1 of the Inflation Act, did Congress intend to exempt from regulation by the respondent only those classes of common carriers or other

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8. Act October 2, 1942, C. 578, 56 Stat. ___; 50 U.S.C.A. App., §§961 et seq.

9. Act October 2, 1942, C. 578, §1, 56 Stat. ___; 50 U.S.C.A. App. §964. This section is set out in footnote 3 on page 5 herein.

public utilities which are subject to regulation by an existing Federal, State or municipal authority?

4. In enacting Section 302(c)(2) of the Price Act as amended by the proviso of Section 1 of the Inflation Act, did Congress intend that the application thereof would be dependent (a) upon the laws of the several states which by their terms subject common carriers and other public utilities to maximum rate regulation, or (b) upon Federal, State and municipal laws which by their terms subject common carriers and other public utilities to such regulation?

5. In enacting Section 302(c) of the Price Act, did Congress intend to exempt from regulation by respondent the rates charged by common carriers which engage in the distribution of commodities but not the rates charged by public utility warehousemen which engage in the storage of commodities?[10]

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The diversity of opinion among the judges of the Emergency Court of Appeals as well as the uncertainty of the conclusions expressed by the two judges who joined in the majority opinion, justify the allowance of the writ.

2. The writ should be allowed because the Emergency Court of Appeals has decided an important question of

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10. Section 302(c) defines the term "Commodity" as including "services rendered • • • in connection with the processing, *distribution*, *storage*, installation, repair, or negotiation of purchases or sales of a commodity • • •" (Emphasis supplied.)

Federal law which has not been, but should be, settled by this Court.

3. The writ should be allowed because the Emergency Court of Appeals has decided a question of general importance which has not been, but should be, settled by this Court.

4. The writ should be allowed because the Emergency Court of Appeals has not given proper effect to applicable decisions of this Court.

CONCLUSION

For the reasons indicated above, as elaborated in the brief filed herewith, your petitioner respectfully prays that a writ of certiorari be issued under the seal of this Court, directed to the United States Emergency Court of Appeals to the end that this cause may be reviewed and determined by this Court, and that the judgment of the Emergency Court of Appeals may be reversed, and that your petitioner may have such further and other relief as this Court may deem proper in the premises.

Respectfully submitted,

REGINALD L. VAUGHAN,
Counsel for Petitioner.

Dated at San Francisco, California,
June 19th, 1943.